IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPLICATION NO.137 OF 2000

The Commissioner of Income-tax,
Bombay Central-III, Bombay .. Petitioner.
V/s.
M/s.Kanakia Builders .. Respondent.

Mr.R.V. Desai, senior counsel with Mr.R. Asokan for the petitioner.

CORAM : S. RADHAKRISHNAN &
J.P. DEVADHAR, JJ.

DATED : 7TH MARCH, 2005.

P.C. :

1. Heard learned counsel for the petitioner. In the above, following substantial questions of law are sought to be raised.

> 1. Whether on the facts and in the circumstances of the case, and in law, the Tribunal was justified in coming to the conclusion that the estimate by the A.O. for on-money charged by the assessee was not correct ?
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> 2. Whether on the facts and in the circumstances of the case, and in law, the Tribunal was justified in coming to the conclusion that the rate of net profit computed by the A.O. @15% on on-money was not correct, ignoring the fact that the rate of 15% adopted by the A.O. had valid basis whereas the assessee's claim on net profit @ 10% was only a request, not having any basis?
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> 3. Whether, on the facts and in the circumstances of the case and in law, the Tribunal was correct in holding that proceedings u/s.158BD are ab initio void in this case, when the Assessing Officer had drawn satisfaction from the documents actually seized during a search in another case, notwithstanding that the Tribunal subsequently held that those documents were

inadequate for initiation of proceedings in this case ?

2. Perused the order dated September 7, 1999 passed by the Income Tax Appellate Tribunal and the Tribunal in para 4,7 and 14 have held as follows :

> '4. The Tribunal, after considering the contentions of the parties at length observed that a fact to suspect cannot be a substitute for a fact proved. When seized material faithfully recorded receipt of different amounts of on-money in respect of different flats/shops, the inference to be drawn is that wherever on-money was received, it was recorded. It was not possible to hold without material that documents were incomplete and then take average and then hold that on-money was received in respect of each flat. Hence, the Tribunal deleted the addition of on-money made on estimate basis.
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> 7. The Tribunal observed that generally in no account cases even the revenue applies 10% rate. It was also observed that in most of the cases, the assessee had shown net profit ranging from 4 to 7%. Hence, it was merely the appreciation of material on record on the basis of which the Tribunal directed the adoption of 10% rate. We fail to understand as to how the reduction of net profit rate from 15% to 10% can be a question of law. Accordingly, the second question in all the applications is rejected.
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> 14. Section 158 BD clearly provides that an assessment of undisclosed income can be made on any person other than the person who was searched u/s.132, if the AO is satisfied that such undisclosed income belongs to any other person. By now it is well settled by scores of decisions of the Tribunal that assessment of undisclosed income can be made only on the basis of material found in the course of search. In the present case, thee is a clear finding by the Tribunal in para 20 of its order that in respect of these assessees no document or material containing undisclosed income was found or seized in course of search. This is essentially a

> finding of fact and accordingly there is no referable question of law arising on this issue from the order of the Tribunal. The question is, therefore, rejected.'

3. In view of the above, the questions only involved findings of fact and as such there will be no substantial question of law arises in this application. The application stands dismissed.

(S. RADHAKRISHNAN, J.)

(J.P. DEVADHAR, J.)